

## **COMMENT ON PROPOSED RULE**

### **Telephone Consumer Protection Act of 1991**

#### **47 CFR 64**

#### **Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991**

#### **AGENCY: Federal Communications Commission (“FCC” or the “Commission”)**

This comment is submitted by the Council of American Survey Research Organizations, Inc. (“CASRO”) in response to the Commission’s Further Notice of Proposed Rulemaking; Request for Public Comments (the “FNPR”) with respect to “Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991” (the “Act”).

CASRO is a not-for-profit industry and professional association representing nearly 250 research companies and institutions engaged in survey research regarding a wide variety of public policy, forensic, health, scientific, economic and other public and private areas of inquiry. Its members are responsible for the overwhelming majority of the survey research conducted each year in the United States and a major portion of global survey research.

Survey research contributes significantly to the public interest by providing reliable, verifiable analyses of a wide variety of public policy, sociological, legislative, regulatory, political, forensic, scientific, public health and economic areas of inquiry. Survey research is an invaluable and irreplaceable tool of behavioral science used to measure, track, analyze and predict public attitudes, opinions, awareness and preferences. Survey research is virtually the only source of statistically reliable and verifiable information of this type, on which government, business and private interests rely to formulate their actions and decisions.

Among the principal purposes of CASRO is the establishment, maintenance and enforcement of professional and ethical standards in survey research and the protection of the

privacy interests of those who choose to participate in survey research. These principles reflect the social utility of survey research and the need to protect and respect the industry's most valuable resource -- its survey respondents.

As one of the leading representatives of the U.S. survey research industry, CASRO has an interest in articulating the compelling public, governmental and business need for protecting not only survey research, but also the rights and concerns of the public and survey respondents. We believe that privacy is one of these important concerns. Accordingly, CASRO supports the Commission's proposed safe harbor from enforcement of the prohibition against autodialed calls to phone numbers recently ported from wire-based to wireless service. CASRO further urges the Commission to adopt a safe harbor that would provide callers with not less than thirty days from the date that number to insure that they do not autodial such numbers.

The Act was enacted to address certain telemarketing practices, including calls to wireless telephone numbers, which Congress found to be an invasion of consumer privacy and even a risk to public safety. In the FNPR, the Commission states that it is seeking "additional comment on the ability of telemarketers, especially small businesses, to comply with the (Act's) prohibition on calls to wireless numbers since implementation of intermodal local number portability." CASRO hereby responds to that portion of the FNPR.

Generally, CASRO recommends that the Commission promulgate rules that are consistent with the Act's legislative intent and the policy of the FCC and other federal agencies in administering national privacy regulations; i.e., that such regulations should be carefully applied so that they continue to protect the privacy interests of consumers, but still allow the survey researchers that comprise CASRO's membership to obtain critical survey information from businesses and individuals.

The survey research industry supports a provision in the rules that would allow its members to have a reasonable period of time within which to update their databases with phone numbers that have been ported from wired service to wireless service, before being in violation of the Act if they call any of those numbers using automatic telephone dialing equipment. Such an action on behalf of the Commission would serve to further its policy of fair and efficient enforcement of the Act and would also allow the survey research industry ample opportunity to take the necessary actions to remain compliant with its provisions. Failing to include the Safe Harbor into the Act would allow the continuation of the excessively and unnecessarily burdensome requirement that the survey research industry instantly and immediately comply with the prohibition against autodialing calls to cellular telephones even when the information necessary to comply with that prohibition is unavailable.

The Commission has requested replies to specific questions in connection with this portion of the FNPR. CASRO respectfully offer the following information in response to those questions:

Question: *1. Should the Commission adopt a limited safe harbor for autodialed and prerecorded message calls to wireless numbers that were recently ported from a wireline service to a wireless service provider?* Answer: We believe that the Commission should adopt a safe harbor for autodialed and prerecorded calls to recently ported wireless numbers. Although the prohibition against prerecorded and autodialed calls has been in effect for almost twelve years, it is only recently that consumers have gained the ability to port their telephone numbers from wired service to wireless service. As a result, when the prohibition against these types of calls was put into place with the adoption of the Act, there was no need to protect against inadvertent

violations caused by recently ported numbers. As technology allows for greater telephone number portability, the Act should be modified to account for these changes.

Even with the creation of new databases of wireless phone numbers, the survey research industry will not be able to obtain instantaneous verification when a telephone number is ported from a wired service to a wireless service. As a result, it is inevitable that there will be some autodialed or prerecorded message calls made to wireless numbers, even with the most up-to-date list of wireless numbers available. It would seem unfair to penalize an entity that has taken all of the steps within its power to avoid violating the Act, but still cannot fully comply because the information necessary to do so is available.

The survey research industry, however, supports this safe harbor provision only for those entities that have made a good faith effort to remain compliant with the Act. Therefore, the safe harbor provision should only apply to entities that are using call lists that are less than thirty days old and that can show efforts to remove from their call lists those numbers that have been ported to wireless service.

*Question: 2. What is the appropriate safe harbor period given both the technological limitations on the survey research industry and the significant privacy and safety concerns regarding calls to wireless subscribers?* Answer: We believe that the appropriate safe harbor period is thirty days. Such a period would reasonably protect the privacy of wireless subscribers, while providing survey research organizations with the opportunity to update their database of wireless phone numbers to remove those numbers recently ported from wired service. A shorter safe harbor period would be insufficient to allow for the collection of newly ported numbers and removal of those numbers from call lists. There will be a time lag between the actual porting of the number to wireless service and when the number is reported as belonging to a wireless

subscriber, and then another time lag between the reporting and the updating of the databases of ported number upon which the survey research industry relies. Finally, the actual removal of the newly ported numbers requires some reasonable period to be sure it is consistently and accurately accomplished. All of these steps cannot be accomplished in less than thirty days. In fact, the increased update frequency could potentially lead to more inadvertent violations of the Act, since in the rush to comply, there could be an increase in the amount of newly ported numbers that are inadvertently not removed from call lists.

Additionally, adopting a thirty day safe harbor provision would mirror the proposed amendment to the safe harbor adopted in association with the development of the national Do-Not-Call Registry (the “DNC”). Consumers’ ability to continually update the DNC by adding their telephone numbers creates a similar problem as consumers’ continual porting of numbers from wired to wireless services. In both cases, industries must continually update their call lists to account for numbers that can no longer be contacted. When the DNC was enacted, industries subject to its regulations were required to update their call lists every quarter in order to retain protection under the DNC’s safe harbor provision, and only now are the FCC and the FTC considering increasing the required update frequency to monthly. We believe that a monthly update requirement is equally appropriate for TCPA autodialer compliance. . Conversely, we believe that a seven day safe harbor as proposed by the Commission would be unworkable and impractical to implement, based on the technological factors and flow of information necessary to achieve compliance. A seven day rule would provide very little in the way of additional support for those seeking to comply than they currently have with no safe harbor. Accordingly, both the practical necessities of obtaining, inputting and removing ported numbers and consistency with DNC safe harbor strongly indicate that the Commission should adopt a 30 day

safe harbor. Forcing the survey research industry to update its call lists more frequently than monthly would result in large, unnecessary expenditures throughout the industry, while offering little or no additional benefit to consumers who have ported numbers from wired to wireless service. A shorter safe harbor would not eliminate prohibited calls to wireless subscribers. In fact, the increased update frequency could potentially lead to more inadvertent violations of the Act, since in the rush to comply, there could be an increase in the amount of newly ported numbers that are inadvertently not removed from call lists.

Question: *Should any safe harbor provision adopted sunset in the future? If so, when?*

Answer: We believe that any safe harbor provision adopted by the Commission should not sunset at any point in the future. There has been no date after which consumers will no longer be able to port numbers from wired to wireless service, meaning that such activity could continue indefinitely. Therefore, the justifications behind the adoption of a safe harbor period will be present throughout the foreseeable future. Accordingly, any the safe harbor protection implemented by the commission should continue as well.

Respectfully submitted,

The Council of American Survey Research Organizations

By: \_\_\_\_\_

Duane L. Berlin, Esq.  
Lev & Berlin, P.C.  
200 Connecticut Avenue  
Norwalk, CT. 06854